No. 2660.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

El Dora Oil Company, J. L. Campbell, H. M. Jackson and John Shrader, doing business under the firm name of Ohio Valley Construction Company, and John Shrader and T. J. Green,
Appellants,

vs.

The United States of America,
Appellee.

BRIEF FOR APPELLANTS.

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STATEMENT OF THE CASE.

This is an action in equity in the form of a bill of complaint brought by the appellee against various defendants, including the appellants, and the bill of complaint is set forth on pages 5 to 30 of the Transcript of Record.

The bill of complaint sets out, in paragraph II, that the plaintiff and appellee "is the owner and entitled to

the immediate and exclusive possession and enjoyment of all the lands next hereinafter described, and of all mineral oil, petroleum, gas and other minerals therein contained. * * * All of said land at all said times has been, and now is, a part of the public domain of the United States, except as withdrawn and reserved from entry as hereinafter alleged." [Tr. p. 10.]

In paragraph III it is alleged that the Secretary of the Interior reserved and withdrew the said land on certain dates, and that the President of the United States, on the dates alleged, also withdrew said land from all forms of location, settlement, selection, filing, entry or disposal under the mineral and non-mineral public land laws of the United States. In the same paragraph [Tr. p. 11] it is further alleged that notwithstanding the withdrawals, the defendants and appellants, subsequent to January 1st, 1910, entered upon the land and pretended to acquire, and now assert mineral rights therein, and had committed, and are now committing, trespass and waste thereupon.

In paragraph IV [Tr. p. 12] it is alleged that the appellant, El Dora Oil Company, subsequent to July 4, 1910, entered upon said land, and drilled an oil well or oil wells, and still is operating said wells, and extracting from said land and appropriated to its own use, large quantities of petroleum.

It is next alleged, on pages 13, 14 and 15, that the El Dora Oil Company, one of the appellants, claims under certain pretended notices of mining location. It is to be noted that one of these notices of mining location is dated January 1st, 1907.

In paragraph V it is alleged that no discovery of petroleum upon any part of the land described was made prior to October 10th, 1910. It is to be noted in said paragraph referred to, that it alleges as follows:

"Prior to January 1, 1910, no person or association or corporation was a *bona fide* occupant or claimant of any part of said land, engaged in the diligent or other prosecution of work leading to the discovery of oil or gas, or any other mineral."

It is further alleged, in paragraph VII [Tr. p. 18], that the defendants, unless restrained, will continue to operate the aforesaid oil wells and extract oil and drill other oil wells, and otherwise commit trespass and waste, to the great and irreparable injury of the plaintiff.

It is then further alleged in paragraph XI [Tr. p. 23] that defendants have no right, title or interest in and to said land, and that the mining locations are void.

Then, in the prayer of said bill of complaint, in paragraph VI [Tr. p. 26], it is asked, in part:
"that a receiver may be appointed by this court to take possession of said land and of all wells, derricks, drills, pumps, storage vats, pipes, pipe lines, shops, houses, machinery, tools and appliances of every character whatsoever thereon, belonging to or in the possession of said defendants, or any of them, which have been used or now are being used in the extraction, storage, transportation, etc., of petroleum or petroleum products, or other minerals. * * *"

Thereafter, a motion to dismiss was made by the appellants [Tr. pp. 31-32] and thereafter an order was made overruling the motion to dismiss, and appointing a receiver. [Tr. pp. 33-37.] It is set forth in said order appointing a receiver that A. E. Campbell be, and he is hereby appointed receiver of the property described in the bill of complaint, claimed by appellants El Dora Oil Company, Campbell, Jackson and Shrader, upon the land described, and "of the oil, gas, and *all other property of every kind situated on said land.*" And again, on page 36, the order recites that "the said receiver is given power and directed to operate any oil or gas well or wells on said property," together with the other matters therein set forth.

Thereafter, a petition for an order allowing appeal was made [Tr. pp. 39-42] setting forth in part the order appointing a receiver, and assigns of error were made.

The appellants rely upon the following:

ASSIGNMENT OF ERRORS.

I.

That said District Court erred in making said order and appointing a receiver.

II.

That said District Court, in making said order, erred in this, that said court had not, nor had the judge thereof, any jurisdiction to make the said order.

III.

That said District Court erred in making said order in this, that the said court abused its discretion and permitted an abuse of discretion in making said order.

IV.

That said District Court erred in making said order, in that the complaint of plaintiff in said action did not show facts justifying the appointment of a receiver.

V.

That said District Court erred in making said order, in that the complaint of plaintiff in the said action fails to state any facts entitling the plaintiff herein to any equitable relief whatsoever.

VI.

That said District Court erred in making said order, in authorizing and directing the receiver to take possession of the property mentioned in said order.

VII.

That said District Court erred in making said order in this, that defendants at that time and long prior thereto were in the actual and peaceable possession of said property, claiming and holding the same under and by virtue of the laws of the United States, and that in and by the allegations of plaintiff's complaint herein, it appears that the plaintiff was and is out of possession. That it does not appear of record herein that an ancillary suit for the appointment of a receiver had

ever been commenced or brought by plaintiff against defendants. That plaintiff had and has a plain, speedy and adequate remedy at law, and said District Court, sitting as a court of equity herein, was and is without authority or jurisdiction to make said order.

VIII.

That the District Court erred in making the order of the 23d day of April, 1915, and entered on the 26th day of April, 1915, appointing a receiver herein, in that said court was wholly without power and jurisdiction to give and make said order for the reasons that a final decree dismissing the bill of complaint herein was entered on the first day of June, 1914; that no motion for a rehearing, or to vacate or annul said final decree herein was entertained by said court during the term of said court in which said final decre was given and made; that during said term of said court no order was made, nor asked for from said court continuing any motion for a rehearing herein, to the succeeding term of said court; that neither during said term of said court, nor at any time thereafter, was any notice of motion for rehearing or any other motion by plaintiff herein served upon or given to the defendants herein. That no appeal from said final decree has ever been taken by the plaintiff herein.

ARGUMENT.

I.

As disclosed by the bill of complaint, the only property that the appellee claims to own was the land described in paragraph II [Tr. p. 9], and there is no allegation in the bill of complaint stating that the personal property set out in the prayer of said bill of complaint, in paragraph 6 [Tr. p. 26], belongs to the appellee. The order appointing the receiver authorizes the receiver to take possession of all of the property of every kind situated on said land, and there is no allegation that the appellee is the owner of the personal property upon said land.

> "But a court cannot appoint a receiver to take charge of property which is not involved in the litigation, or to take charge of all of a debtor's property, including that which is not, as well as that which is, specially bound for the payment of the claim in suit."
>
> 34 Cyc. 44, note 45 therein.

This note cites a large number of cases in the different states, together with several United States cases, to-wit:

> Smith v. McCullough, 104 U. S. 25, 26 L. Ed. 637, and other cases.

Again, in the same note, it says:

> "The property must be the direct subject of the action, and the judgment, to be granted, must act upon the specific property."
>
> Johnson v. Cochran, 36 N. Y. Supp. 287.

Therefore, the court could not appoint a receiver to take charge of, or possession of, all other property of every kind situated on said land, and particularly referred to in paragraph VI of the prayer, and also referred to in the order appointing the receiver. [Tr. p. 35.] For, it is not alleged in the bill of complaint, in any paragraph, that the plaintiff and appellee is the owner of the personal property, or any other property except the particularly described real estate, to-wit: The southeast quarter (SE¼) of section thirty-two (32), township twelve (12) north, range twenty-three west, S. B. M., Kern county, state of California. [Tr. p. 9.]

It not being alleged that the plaintiff and appellee was the owner of and entitled to the possession of the personal property, the court was without jurisdiction to make the order appointing a receiver, as set forth herein. It is so well settled that there must be an allegation on the part of the complainant that he is entitled to certain property in order to give the court jurisdiction to appoint a receiver therefor, that the citation of authorities on this point would seem to be unnecessary.

II.

Laches and acquiescence of appellee is a bar to the appointment of a receiver. It is to be noted that it is alleged in the bill of complaint [Tr. p. 16] that on October 10, 1910, petroleum and other minerals were discovered, and it is further alleged that these appellants, subsequent to July 4th, 1910, have been in the

said possession of said land, and have drilled oil wells thereon, and have extracted oil therefrom. [Tr. pp. 12-13.] The bill of complaint was filed February 27th, 1913. [Tr. p. 5.] A period of two years, seven and one-half months. There is no allegation or reason set out in said bill of complaint that the said appellee did not know of the act or acts of said appellants until a short time before the filing of this bill of complaint. There is no allegation that the appellee served any notice or gave the appellants any demand for the possession of the said premises.

The appellee stood idly by and permitted these appellants to drill oil wells thereon, under the allegations set out in said bill of complaint.

As was said in High on Receivers, 4th Edition, 1910, paragraph 14:

> "So an application for a receiver is not entitled to favorable consideration, when the plaintiff has lain by for a long period of years and quietly acquiesced in a condition of affairs which he seeks to change by obtaining a receiver. For example, where plaintiffs seek the aid of a receiver over property in which they claim some interest, but which has been in the possession of defendants for a long period of years, during all of which time plaintiffs and those under whom they claim have acquiesced in such possession, equity will not interfere by a receiver *in limine*."

And again in the same paragraph, it says in effect that where the application is based upon alleged mis-

conduct of the trustees and his misappropriation of funds, but it is shown that the state of affairs complained of has existed for very many years with plaintiff's knowledge, and without objection on their part, the court will not take the property from defendant's hands and place it in the custody of a receiver.

Again, in paragraph 593 of High on Receivers, same edition, the plaintiff seeking the aid of a receiver over real property, that it is intended that he should use due diligence in the assertion of his rights, since long acquiescence in defendant's position may suffice to bar him from the relief asked for, and as it is further said:

> "When a shareholder in a corporation seeks a receiver over real property held by defendant, alleging it to be the property of a corporation, but plaintiff has acquiesced in defendant's possession and use of the property for a number of years without question or remonstrance and shows no danger on the ground of defendant's responsibility, he will not be allowed a receiver."

To the same effect:

34 Cyc. 44.

III.

There is no allegation of the insolvency of appellants, but there is an allegation that these defendants claim under a pretended legal title.

As stated in the heading, there is no allegation in the bill of complaint that the appellants are insolvent, or unable to respond in damages. There is an allegation that the appellants are in possession and are re-

ceiving the profits of said land under the claim of legal title, to-wit, the location notices, as set forth.

Consequently, the court erred in making said order appointing a receiver.

> "And whenever the contest is simply a question of disputed title to the property, plaintiff asserting a legal title in himself, against a defendant in possession, and receiving rents and profits *under claim of legal title,* equity refuses to lend its extraordinary aid by interposing a receiver, just as it refuses an injunction under similar circumstances, leaving the plaintiff to assert his title in the ordinary forms of procedure at law. * * * Nor will defendant be deprived of his possession by a receiver, unles it is made to appear that there is great risk of ultimate loss to the property, and of insolvency on the part of defendant, so that he will be unable to respond to a final decree."
>
> Section 557 High on Receivers, 4th Edition, 1910.

In relation to appointing receivers over mines, it has been held in the case of a mortgage upon the property that it was necessary that it be alleged in the complaint that the mortgagor is insolvent, and that the mining claim will be worked out.

> Section 614 High on Receivers;
> Hill v. Taylor, 22 Cal. 191.

It is also held that in the case of a colliery or mine that a receiver will not be appointed when it is not alleged that the defendants in possession are insolvent, or that they are unable to account for the mesne

profits, or that the property is being injured under their management.

Section 615 High on Receivers.

IV.

There is no allegation in the bill showing the facts constituting the irreparable injury and the insolvency of the appellants, where it is alleged that the appellants claim some legal title.

In this connection, it is not the policy of the courts to take charge of real property where the defendant is in possession and is asserting a legal title to the property.

34 Cyc. 51.

It is beyond argument, almost, that the mining laws of the United States permit persons to take up mining claims, and, having performed the requirements of the mining laws, that the locators or persons deriving title therefrom are entitled to hold the possession as against everyone, and in effect have the legal title for that purpose.

It must appear in a mining case, or in a suit affecting the appointment of a receiver affecting mines, that the parties in possession are insolvent, and the same rule applies to oil wells.

Cases cited under note 71, 34 Cyc. 51, and particularly citing:

Hickey v. Parrot Silver etc., 25 Mont. 164, 64 Pac. 230, and other cases.

Specification VIII is borne out by the record on appeal and the records, files and papers in said cause, and therefore the court had no jurisdiction, without proceeding in the manner set forth in assignment No. VIII, without entertaining a motion for a rehearing or to vacate or annul the final decree, and without notice served upon these appellants.

Wherefore, it is respectfully submitted that the order appealed from should be reversed and set aside.

Respectfully submitted,

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Attorneys for Appellants.